IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 517

THE NATIONAL BOARD OF THE YOUNG MEN'S CHRISTIAN ASSOCIATIONS, ET AL., *Petitioners*

v.

THE UNITED STATES

BRIEF FOR PETITIONERS

HARDING A. ORREN
ROBINS, DAVIS & LYONS
Dain Tower
Minneapolis, Minnesota

RONALD A. JACKS
1025 Connecticut Ave., N.W.
Washington, D. C.

SHERMAN L. COHN
506 E Street, N. W.
Washington, D. C.

Counsel for Petitioners

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OPINION BELOW

The opinion of the Court of Claims (J.A. 199a) is reported at 396 F. 2d 467 (1968).

JURISDICTION

The judgment of the Court of Claims was entered on June 14, 1968. The petition for certiorari was filed on September 12, 1968, and granted on November 25, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1255 (1).

QUESTIONS PRESENTED

1. Whether the United States' obligation to pay just compensation under the Fifth Amendment is suspended during peacetime confrontations between U. S. military forces and private citizens.

2. Whether *United States* v. *Caltex* ought to be overruled.

STATEMENT

This is a joint claim for just compensation under the Fifth Amendment to the United States Constitution, arising out of the United States Army's seizure and use of petitioners' real property during the Panamanian riots of 1964. The basic facts have been stipulated (J.A. 21a)[1] and are not in dispute.

On Thursday, January 9, 1964, a long-smouldering dispute concerning the flying of Panamanian and American flags in the Canal Zone broke into open

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[1] The parties stipulated in the court below that the basic facts of this case are not in dispute, since they were established and set forth in the official "United States Presentation" to the Select Committee of the Organization of American States, established under OAS/OC resolution of February 6, 1964, to investigate charges of American aggression in Panama in January 1964. It was agreed that the official United States oral and written presentations together with the other documents submitted to the court below contain a complete and accurate account of the events in question and the pertinent background facts related thereto. The portions of this material pertinent to the case in its posture before this Court, stipulated as the Appendix, consist of the "United States Presentation, Background and Chronology of the Events in Panama and the Canal Zone on the Ninth, Tenth, and Subsequent Days in January 1964," a "Fact Sheet" compiled by the Office of General Counsel of the Army, and pertinent portions of the "Transcript of the United States Oral Presentation on February 14th and 15th, 1964 to the Committee Established under the Resolution of the OAS/OC, February 6, 1964."

rioting (J.A. 26a-42a). The rioting occurred first in Balboa on the Pacific side of the Canal Zone (J.A. 41a-42a). By 8 p.m. on the 9th, demonstrations had broken out in Cristobal on the Atlantic side (J.A. 62a-63a). The buildings which are the subject of this joint claim are located in Cristobal. They are owned by Young Men's Christian Association (YMCA) and Sojourners Lodge of the Masonic Temple,[2] and are situated just inside the Zone at the intersection of Bolivar and 11th Streets. These streets form a right angle, and their centers constitute the boundary line between the Canal Zone and the Republic of Panama at that point (J.A. 65a, 222a).

The demonstrations in Cristobal remained "not violent" until about 9:30 p.m., at which time, the crowd became unruly (J.A. 63a, 95a). Rocks were thrown and windows were broken, resulting in damage to the Masonic Temple, the YMCA, as well as other buildings (J.A. 63a-64a, 95a-96a).

By 10:20 p.m., the first contingent of United States Army troops arrived in Cristobal. They were given the mission of clearing the area along the border, including the area in which the Masonic Temple and the YMCA were located (J.A. 65a, 96a-97a).[3] The troops

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[2] The YMCA and Masonic Temple are joined as a petitioner by the YMCA's property insurer which paid a portion of the loss under the limits of its policy and thus is subrogated to that extent of the YMCA's total loss (J.A. 11a).

[3] At 7:59 p.m. the Acting Governor of the Canal Zone reported to the Commanding General of the United States Army Southern Command that he was unable to maintain law and order in the Canal Zone with only police and civilian authorities. The Acting Governor requested the Commanding General to assume command of the Canal Zone (J.A. 46a). Troops were immediately ordered to clear the Pacific side of the Canal Zone of demonstrators. Troops in the Atlantic side were put on alert (J.A. 46a).

cleared the rioters out of buildings (J.A. 47a), and took up guard positions on the boundary along 11th Street and Bolivar. The Zone was thus sealed off from the Republic of Panama (J.A. 65a-66a, 98a, 161a). As a result of this action, the troops were stationed in the streets directly in front of the Masonic Temple and the YMCA (J.A. 65a-66a, 98a). Their orders were to contain their fire at all costs (J.A. 66a). Meanwhile, the rioters began hurling "rocks, sticks, bottles, anything that they had," including Molotov cocktails, at the troops (J.A. 66a, 98a, 161a). There was also sniper fire from the Panama side (J.A. 66a, 98a, 162a). However, the troops were held to their standing orders not to return gunfire (J.A. 66a, 165a). "During these initial hours when the Infantry remained in position on the line, only tear gas grenades were used to contain the mob and discourage their attacks" (J.A. 99a).

The commanding officer of Company C then ordered the troops to withdraw into the Masonic Temple, the YMCA, and the Commissary Building "to protect the troops from the sniper fire" (J.A. 67a, 99a). Command and observation posts were set up inside the Masonic Temple (J.A. 68a, 100a).

In an apparent attempt to force the United States troops to abandon their positions, the rioters initiated a series of Molotov cocktail attacks against the wooden framed YMCA (J.A. 68a, 99a). By 2 p.m. on Friday, January 10th, the YMCA was in flames and the troops were forced to withdraw (J.A. 68a, 100a). The rioters then shifted their attack to the Masonic Temple with its Command Post (J.A. 68a, 100a). Although they succeeded in starting fires in the Masonic Temple, so that the Army was forced to move its Command Post, the building was not completely destroyed because of

its brick construction (J.A. 68a, 100a-101a, 165a-166a). Thus, although the Army decided to move its Command Post, it was able to maintain an observation post on the top floor of the Masonic Temple throughout the period from January 9th to the end of the disturbances on January 13th (J.A. 68a, 70a, 100a-101a, 165a-166a). During the afternoon of January 11th, the Army finally permitted a small group of expert marksmen to use shotguns, but only to fire against known snipers (J.A. 69a, 100a-101a, 165a). They were not permitted to fire upon the rioters who were throwing Molotov cocktails at any time during the disturbances (J.A. 101a).

After the riots were over, the Army inspected the petitioners' buildings and ordered them altered to provide further fortification in the event of future riots.[4]

Petitioners filed administrative claims with the Department of the Army under 10 U.S.C. 2733. These claims were denied (J.A. 12a-13a, 18a), whereupon petitioners filed the instant action in the Court of Claims seeking just compensation under the Fifth Amendment (J.A. 2a). The Government entered a general denial, and the matter was submitted to the lower court on cross-motions for summary judgment, based upon stipulated facts (J.A. 17a, 20a, 21a, 198a).

The Court of Claims, Judge Davis dissenting, granted the Government's motion for summary judg-

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[4] In the court below, petitioners sought compensation both for (1) the loss sustained during the Army's seizure and occupation of the buildings and (2) the loss sustained through the alterations ordered after the end of the riots. The latter claim was denied by the court below upon its finding that there had been an accord and satisfaction between the Army and the petitioners (J.A. 211a). As this constituted a factual determination limited to this case, it is an issue which has not been pursued in this Court.

ment, denying petitioners' motions. The court found from the stipulated facts that the Army had moved the troops into the petitioners' building "in order to protect [the] . . . troops from sniper fire" (J.A. 202a), and that the private property served "as a temporary refuge for our military forces during an actual confrontation with hostile enemy forces" (J.A. 205a). Relying heavily upon this Court's decision in *United States* v. *Caltex*, 344 U.S. 149 (1952), the Court of Claims held that "a temporary occupancy of private property which is immediately necessary for the safety of troops or to meet an emergency threatening great public danger" is non-compensable under the Fifth Amendment. (J.A. 208a) Judge Davis agreed with the court's findings of fact but dissented from its statement of the controlling principles. In his view, the "traditional rules" demanded that compensation "must" be allowed under the Fifth Amendment for "the seizure and use of . . . buildings as a place of refuge and defense for American troops" (J.A. 213a, 215a). In support of this position he quoted the Government's position in its brief which conceded this to be a correct statement of the applicable law (J.A. 213a).

ARGUMENT

INTRODUCTION AND SUMMARY

This case presents a classic confrontation between the Government's right to seize private property in a time of need and the citizen's right to just compensation. Unlike many of the recent Fifth Amendment cases in this Court, it does not involve an application of the basic principles of just compensation to new and novel facts. Rather, it turns on occurrences strikingly similar to those envisaged by the

early Seventeenth and Eighteenth Century writers and the judges at common law who developed the principles of just compensation.

In Part I of the Argument, we show that these basic principles of just compensation dictate that payment must be made for the loss in question unless there is an exception which is clearly applicable here. The Court of Claims found such an exception in *United States* v. *Caltex,* 344 U.S. 149 (1952), and hence in Part II we examine *Caltex,* and conclude that initially it is inapplicable on its face because of strikingly dissimilar facts. We then go on to examine the question of whether its rationale can be extended to support the result reached below. In so doing, we review *Caltex's* historical antecedents and conclude that they point to a duty of compensation, rather than its denial.

In Part III, we examine the question of whether *Caltex* itself is sound. We conclude that the decision is fundamentally foreign to the basic concepts of the Fifth Amendment and therefore ought to be overruled. In reaching this conclusion, we examine the cases relied upon in *Caltex* and conclude they would not and do not justify the result reached therein—either as square holdings or as interpreted in the light of our modern understanding of the Government's responsibility to provide just compensation where one individual's property is taken for the good of all.

I.

GENERAL PRINCIPLES OF JUST COMPENSATION DICTATE THAT PAYMENT MUST BE MADE FOR THE TAKING OF PETITIONERS' BUILDINGS FOR THE DEFENSE OF THE CANAL ZONE

Mr. Justice Story has said that the Just Compensation Clause of the Fifth Amendment "is an affirmance of a great doctrine established by the common law, for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed, in a free government . . . almost all other rights would become utterly worthless, if the government possessed an uncontrollable power over the private fortune of every citizen." Story, *On the Constitution* § 234 (1840).

This view of the Fifth Amendment represents a reconciliation between the fact that the State has been delegated the authority to further the interests of the whole by taking private property *pro bono publico,* and the fundamental proposition that the interest of the individual is to be protected by the payment of just compensation. Thus, "a provision for compensation," said Chancellor Kent, speaking for the New York Court of Chancery in 1816, "is an indispensable attendant on the due and constitutional exercise of the power of depriving an individual of his property . . . ." *Gardner* v. *Trustees of Newburgh,* 2 Johns. Ch. 162. Similarly, the New Jersey Supreme Court of Judicature determined in 1839 that both the right of the State to take private property and the right of the individual to compensation for property taken, were so fundamental that they existed even in the absence of any con-

stitutional provision. *Sinnickson* v. *Johnson*, 2 Harrison (17 N.J.L.) 129.

The writers of the Seventeenth and Eighteenth Centuries, who had such an important influence upon the authors of our Constitution,[5] refer time and again to this immutable principle. One of the most distinguished of these authorities, Grotius, recognized the right of Government to take private property for public use "in case of extreme emergency," but observed that

> when this is done the State is bound to make good the loss to those who lose their property; and to this public purpose, among others, he who has suffered the loss must, if need be, contribute. Nor is the State relieved from this *onus*, if, for the present, it be unable to discharge it; but at any future time, when the means are there, the obligation which had been suspended revives.

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[5] Mr. Chief Justice Marshall, although discussing the meaning of the phrase *obligation of contract* in the Constitution, noted that "When we advert to the course of reading generally pursued by American statesmen in early life, we must suppose that the framers of our constitution were intimately acquainted with the writings of those wise and learned men, whose treatises on the laws of nature and nations have guided public opinion . . . ." *Ogden* v. *Saunders*, 12 Wheat. (25 U.S.) 213, 353-354 (1827) (dissenting opinion). See Professor Corwin's highly illuminating discussion of this point in "The 'Higher Law' Background of American Constitutional Law," 42 Harvard L. Rev. 149-185, 365-409 (1928). For a recent and most incisive review of the connection between the writers of the Seventeenth and Eighteenth Centuries and the Constitution, see Antieau, *Rights of Our Fathers* (1968).

De Jure Belli et Pacis, lib. iii, c. 20, s. 7 (1625) at 326-327, Whewell's ed. (1853). Pufendorf (1672),[6] Bynkershoek (1737),[7] Vattel (1758)[8] agree.

The seeds of this principle go back even further. In 1606 all of the Justices assembled in Parliament to

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[6] De Jure Naturae et Genitum, lib. i, c. 1, s. 19:

> It is a matter of natural equity, when there is to be a contribution towards the preservation of anything possessed in common by those who share in it, that individuals should contribute only a proportional share, and that no one should be oppressively loaded beyond others. The same thing holds in States. But since often the exigencies of a government are such that either urgent necessity does not allow the fixing of the proportions of what is to be collected from individuals, or else some specific possession of one citizen, or of a few, is required for the necessary uses of the State, the supreme government must be able to apply this thing to the public necessities: provided, nevertheless, that what exceeds the proportional share of its owners shall be refunded by the other citizens.

[7] Quest. Jur. Pub., lib. ii, c. 15:

> But when a fit reason requires it, whatever he takes away, let him take it with as little harm to his subjects as may be, and upon paying the price out of the common chest. Whoever purposes anything else is rather a robber than a prince. . . . But for whatever reason the subject's property or claims (*res vel actiones*) are taken and destroyed, what Grotius adds . . . is fair and just, that the owner's compensation should be paid out of the public money.

[8] *Le Droit des Gens*, lib. i, c. 20, s. 244:

> And so when he disposes, in an exigency, of the property of a community or an individual, the alienation is valid, for the same reason. But justice demands that this community or this individual be made whole out of the public money; and if the State have not enough to do this, all the citizens are bound to contribute; for the expenses of the State should be borne equally or in a just proportion. In this respect it is like throwing merchandise overboard to save the ship.

rule on the King's prerogative concerning the digging and taking of saltpetre to make gunpowder. It was held that the Crown had a purveyance which permitted him to dig for saltpetre on private land, "inasmuch as this concerns the necessary defense of the realm," but, in digging, his ministers "are bound to leave the inheritance of the subject in so good plight as they found it . . . .". The court went on to say that:

> [W]hen enemies come against the realm to the sea-coast, it is lawful to come upon my land adjoining to the same coast, to make trenches or bulwarks for the defence of the realm, for every subject hath benefit by it. . . . And in such case on such extremity they may dig for gravel, for the making of bulwarks; for this is for the public, and every one hath benefit by it, but after the danger is over the trenches and bulwarks ought to be removed, *so that the owner shall not have prejudice in his inheritance* . . . .

The Case of the King's Prerogative In Saltpetre, 12 Coke's Reports 12-13, 77 Eng. Rep. 1294, 1295 (1606) (emphasis added).

These principles have been made a part of the fundamental law of the United States. The right of the Government to take private property for public use, although not explicitly recognized in the Constitution, has been held to be vested in the Federal Government: "The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law." *Kohl* v. *United States,* 91 U.S. 367, 371-372 (1875). Coupled with this right to take and use for public purposes is the duty of the general public to pay for what it takes. The Just Compensation Clause was designed to ensure that the duty

is carired out, *i.e.*, to make whole the individual whose property has been appropriated so that he suffers no more than the rest of the public.

This natural and necessary corollary to the authority to take is embodied in the Constitution of every state in the Union except for North Carolina,[9] where the same result obtains as a matter of law. *Johnson* v. *Rankin*, 70 N.C. 550 (1874).[10] There is no wonder at this recognition, for here, as in England, a disregard of the right of compensation upon the taking of private property has been held to be contrary to the "unwritten law," [11] to the "spirit of the Constitution," [12] to "common-law doctrine," [13] against "nat-

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[9] See chart contained in 1 Nichols, *Eminent Domain* § 1.3, pp. 68-71 (1964).

[10] See to the same effect: *Bonaparte* v. *Camden & A.R.*, 3 Fed. Cas. 821, No. 1617 (C.C. N.J. 1830) (opinion per Baldwin, Circuit Justice); Ex parte *Martin*, 13 Ark. 198 (1853); *Young* v. *McKenzie*, 3 Ga. 31 (1847); *Parham* v. *The Justices*, 9 Ga. 341 at 349 (1851) ("This was the law of the land in England, before Magna Charta. Against the contrary the great Charta guarded . . . . The petition of rights affirmed the same doctrine; and this great rule of right and liberty was the law of this state at the adoption of the Constitution. It is not, therefore, necessary to go to the Federal Constitution for it. It came to us with the common law—it is a part and parcel of our social polity—it is inherent in ours, as well as every other free government."); *Bristol* v. *New Chester*, 3 N.H. 524 (1826); *Sinnickson* v. *Johnson*, 2 Harrison (17 N.J.L.) 129 (1839); *Gardner* v. *Trustees of Newburgh*, 2 Johns. Ch. 162 (N.Y. 1816) (opinion per Kent, C.).

[11] *Virginia & Truckee R. R.* v. *Henry*, 8 Nev. 165, 171 (1873).

[12] *In the Matter of Albany Street*, 11 Wend. 149 (N.Y. 1834).

[13] *Parham* v. *The Justices*, 9 Ga. 341, 351 (1851).

ural equity,"[14] a violation of "natural justice,"[15] and of "that sense of justice and right which is acknowledged and felt by the whole civilized world."[16] The proposition was succinctly stated by the Supreme Court of Minnesota: "[P]ublic necessity, in time of war or peace, may require the taking of private property for public purposes; but under our system of jurisprudence *compensation must be made.*" *Vincent* v. *Lake Erie Transportation Co.*, 109 Minn. 456, 460 (1910) (emphasis added). This right to compensation, "is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed, in a free government, almost all other rights become worthless if the government possesses the uncontrollable power over the private fortunes of the every-day citizen." *Chicago, B. & Q. R. R.* v. *Chicago*, 166 U.S. 226, 236 (1897) quoting 2 Story *Const.* § 1790.

Thus, the Fifth Amendment speaks in the absolute: "nor shall private property be taken for public use without just compensation." This Clause contains the "great doctrine established by the common law . . . founded in natural equity . . . a principle of universal law." Story, *On the Constitution* Sec. 394 (1840). Through the years, the general principles of this doctrine have become clear:

1. The taking which requires compensation may be of the fee, but it may be of less. It may be an easement, *United States* v. *Causby*, 328 U.S. 256, 261-62 (1946),

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[14] *Johnson* v. *Rankin*, 70 N.C. 550 (1874).

[15] *Ex parte Martin*, 13 Ark. 198 (1853).

[16] Mr. Chief Justice Marshall in *United States* v. *Percheman*, 7 Pet. (32 U.S.), 51, 87 (1833).

or it may be a servitude, *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U.S. 327, 330 (1922).

2. The taking may be in the form of a physical entry on the land, but it need not be. See *United States* v. *Causby, supra; Portsmouth Harbor L. & H. Co.* v. *United States, supra; Baltimore & Potomac R.* v. *Fifth Baptist Church*, 108 U.S. 317 (1883); *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 179 (1958) (dissenting opinion of Mr. Justice Harlan).

3. The occupation and use of the property may be with formal proceedings provided by statute or it may be an informal, or *de facto*, taking where no formal proceedings are ever brought. *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275, 291 (1958); *United States* v. *Dickinson*, 331 U.S. 745 (1947); *United States* v. *Causby*, 328 U.S. 256 (1946); *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945).

4. The occupation and use by the sovereign may be permanent, but a temporary occupation and use is nonetheless a taking requiring compensation. *United States* v. *Pewee Coal Co.*, 341 U.S. 114 (1951); *United States* v. *Petty Motor Co.*, 327 U.S. 372 (1946); *United States* v. *General Motors Corp., supra; Alexander* v. *United States*, 39 Ct. Cls. 383 (1904);[17] *Johnson* v. *United States*, 4 Ct. Cls. 248 (1868);[18] *McKeon* v. *New York, N.H.&H.R.*, 75 Conn. 343, 347 (1902), affirmed

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[17] United States held liable for damage done to private property during 44-day occupation and use as a military encampment due to "military necessity." 39 Ct. Cls. at 396.

[18] The court held that the temporary occupancy of land raised an "implied lease" for which compensation was due. 4 Ct. Cls. at 250.

per curiam, 189 U.S. 508 (1903).[19] Cf. *Brigham* v. *Edmands,* 7 Gray (73 Mass.) 359 (1856).[20]

5. Intent to take is not a crucial factor, for its absence does not free the Government from the duty of compensating where there has been a taking. See *e.g., United States* v. *Dickinson,* 331 U.S. 745 (1947); *Causby, supra; General Motors, supra; Jacobs* v. *United States,* 290 U.S. 13 (1933); *Sioux Tribe* v. *United States,* 315 F. 2d 378 (Ct. Cls. 1963).

6. Where there is a physical occupation, the taking becomes complete and the duty to compensate arises at the moment of occupation. As this Court stated in *United States* v. *Dickinson,* 331 U.S. 745, 751 (1947): "The land was taken when it was taken and an obligation to pay for it then arose."[21]

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[19] That the occupation was "temporary" and was then removed was held to be "only important in determining the amount of compensation to which he [the plaintiff] is entitled." 75 Conn. at 347.

[20] Although there was an occupation and use of property by a military unit for only three days, the court held the plaintiff entitled to compensation, as there was "an exclusive appropriation, to a specific public use, of the property of an individual, for a distinct period of time, depriving the owner of its actual possession and enjoyment, and exposing it to necessary and essential damage." 7 Gray at 363. As the occupation was held to be unauthorized, the military commander was held personally liable.

[21] There are two more elements not here at issue. First, the taking must be for a public use or necessity, *Wilkinson* v. *Leland,* 2 Pet. (27 U.S.) 627 (1829); *Cole* v. *La Grange,* 113 U.S. 1 (1885), although what constitutes a public use or necessity is not always clear and certain. Finally, the taking must be authorized, *United States* v. *North American Transp. & Trading Co.,* 253 U.S. 330, 333 (1920); but see Abend, "Federal Liability for Takings and Torts," 31 Fordham L. Rev. 481, 492 (1963), or the individual and not the State is liable to the private owner. *Mitchell* v. *Harmony,* 13 How. (54 U.S.) 115 (1851); *Brigham* v. *Edmands,* 7 Gray (73 Mass.) 359 (1856).

Applying these principles to the instant case, it is clear that the physical use and occupation of petitioners' land and buildings constituted a *taking*. The occupation was for a public use, since its ultimate purpose was protection of property and persons within the Canal Zone and defense of the vital interest of the United States in the Panama Canal. The immediate purpose, tending toward the ultimate, was the placing of the troops defending the Zone in a place of relative safety and refuge where they could carry out their ultimate mission more effectively with a minimum number of casualties. We do not dispute that the military commander who ordered his troops from the streets into this place of refuge and relative safety had the right to do so. Nor is there any question that when the Army ceased its use and occupation of petitioners' buildings and returned them to petitioners, they were in substantially worse condition than when the Army's use and occupation began.[22]

The principles of natural justice and equity enveloped in the Just Compensation Clause of the Fifth Amendment, but antedating that Clause by many centuries, dictate that, when petitioners' private property was taken for the good of all, petitioners should not have to bear more than their proportional share of the loss. The general principles of Fifth Amendment developed by this Court demand a similar result.

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[22] As has been noted previously (n. 4, p. 5, *supra*), no claim is made here for damage done to the buildings by the rioters prior to their expulsion, or by the troops in expelling them. This claim involves only damage suffered *subsequent* to the Army's reoccupation of the buildings as a command post, refuge and fortification. Nor is any claim made here for injury caused the petitioners by the alterations to the buildings *after* the Army's occupation ended and the buildings were returned to petitioners.

These principles must govern in this case—unless there be an exception which would require that one individual bear the loss which benefits all.

The Court of Claims found such an exception in this Court's decision in *United States* v. *Caltex,* 344 U.S. 149 (1952). It is petitioners' position, as developed in Part II below, that *Caltex* has no application to this case, and its extension or utilization to create a new exception is unwarranted and destructive of these basic principles. However, should this Court agree with the Court of Claims that *Caltex* is controlling, then it is petitioners' view, as developed in Part III of the Argument, that *Caltex* is wrong and ought to be overruled.

II.

NO EXCEPTION TO THE JUST COMPENSATION CLAUSE PERMITS DENIAL OF COMPENSATION FOR PROPERTY TAKEN BY THE MILITARY FOR PUBLIC USE DURING A PEACETIME CONFRONTATION

A. The Caltex Holding Is Inapplicable to the Facts of This Case

Caltex was an action for the value of terminal installations and equipment owned by the plaintiff oil companies and located in the Philippine Islands. The property was deliberately destroyed by the United States Army to prevent their falling into the hands of the advancing Japanese forces at the outbreak of World War II. The Court of Claims held that the Army's action amounted to a taking for which the Fifth Amendment required that the oil companies be justly compensated. This Court reversed (Justice Black and Douglas dissenting), holding that there was no compensable taking since the property "was destroyed, not appropriated for subsequent use," 344 U.S. at 155. Building on the rationale of *United States* v.

Pacific R. R., 120 U.S. 227 (1887), the Court stated that there is no obligation on the part of the United States to "make whole all who suffer from every ravage and burden of war. . . . [*I*]*n wartime* many losses must be attributed solely to the fortunes of war, and not to the sovereign." 344 U.S. at 155-56 (emphasis added). While this Court recognized that there were no rigid rules to distinguish compensable from non-compensable losses, it found the loss in *Caltex* to be noncompensable because, *inter alia:* "[T]his property, due to the fortunes of war, had become a potential weapon of great significance to the invader. . . . It was destroyed that the United States might better and sooner destroy the enemy." 344 U.S. at 155. In so doing, however, the Court did not overrule its earlier decisions in *Mitchell* v. *Harmony*, 13 How. (54 U.S.) 115 (1851), and *United States* v. *Russell*, 13 Wall. (80 U.S.) 623 (1871), which held that the Government was liable for property which was taken and used, but not deliberately destroyed, by U. S. forces in time of war.

While petitioners respectfully question the wisdom of the *Caltex* rule (see Part III of the Argument, *infra*, pp. 34-43), a comparison of the facts of this case with those in *Caltex* makes it clear that the Court of Claims erred in extending the *Caltex* holding to fit these facts. *Caltex*, whatever its validity, depends upon the following elements:

1) Deliberate destruction of property (as distinguished from use and occupation);

2) In time of war;

3) For the purpose of denying the enemy a weapon (or other property of military significance) which

would have fallen into their hands if not destroyed.

None of these elements is present in the instant case.

1) Petitioners' property was seized for use and not destruction. The Army occupied petitioners' buildings and land as a place of refuge from the stones, bullets, and Molotov cocktails which were being directed at the troops. Indeed, the use was even broader since the buildings were converted into a command post as well as a fortification or rampart from which the Army maintained its defense of the border, thus protecting the entire Zone at that critical point. In terms of the facts of *Caltex,* there was no purpose on the part of the Army to destroy, but rather to preserve and use petitioners' buildings for the good of the entire Zone.

2) The events in question did not constitute a "war" by any stretch of logic. Rather, they involved a peacetime confrontation between rioting and looting civilians and the authorities responsible for public safety. The fact that United States military forces were needed to assist in this process certainly did not place the United States at war with the Republic of Panama or any other power. Thus, the United States Government, in its presentation to the O.A.S., constantly reemphasized our nonbelligerent status. It stated time and again that its troops were engaged in essentially a "riot control function," acting with the utmost restraint in the face of "relatively small crowds who were being exhorted by individual agitators" (J.A. 89a-90a, 186a-187a, 191a). The restrictions on the use of even the most elementary weapons, described above, are perhaps the best evidence of the distinction between the Panamanian situation and a "war."

3) There is no indication in the record that the buildings in question would have been seized and used by the rioters as an "offensive weapon" if the troops had not occupied them. Nor is there any suggestion that the Army ever considered deliberately destroying the buildings to prevent them from falling into "enemy" hands. Rather, the sole purpose in the seizure and use was to provide a defensive facility to the Army—a use which eventually attracted the mob's concentrated response.

Ultimately, the *Caltex* decision can best be characterized in the words of Mr. Justice Harlan, as involving that "extraordinary situation where private property is destroyed by American armed forces to meet the exigencies of the military situation in a theatre of war . . . ," *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 182 (1958) (dissenting opinion). The factual elements of that "extraordinary situation" simply are not present here.

B. The Court Below Erred in Extending the Caltex Exception To Apply to a Use of Private Property "Immediately Necessary for the Safety of Troops or To Meet an Emergency Threatening Great Public Danger."

The Court of Claims read the *Caltex* decision as enunciating a broad doctrine that would immunize the United States Government from any "losses attributable to the fortunes of war or public necessity in times of imminent danger or peril." The Court of Claims specifically held that this doctrine applies when the military, for the good of the community as a whole, takes an individual's private property for "temporary occupancy" where it is "*immediately necessary for*

the safety of troops or to meet an emergency threatening great public danger . . . ." (Emphasis added.) This holding represents an extraordinary and unwarranted extension of the *Caltex* decision, one which is basically at odds with *Caltex's* historical antecedents.

1. *The Earlier American Case Law.*

This Court in *Caltex* and the court below in the instant case relied heavily on *United States* v. *Pacific R.R.*, 120 U.S. 227 (1887), which centered upon a Government counterclaim for the cost of railroad bridges built by the Army during the Civil War as a matter of "military necessity" to replace four bridges, two of which had been destroyed by the enemy and two by Union forces. 120 U.S. at 231-32. The Court held that there was no obligation for the railroad to pay for work done, "not at its request or for its benefit, but solely to enable the government to carry on its military operations." 120 U.S. at 233. The Court then went on to examine the somewhat hypothetical question of whether the railroad could have recovered from the Government for the two bridges previously destroyed by the Union Army.[23] The Court concluded that if the railroad had sought to recover the value of those bridges from the Government, the Court would have been obliged to find the Government exempt from "liability for private property injured or destroyed during war, by the operation of armies in the field, or by

[23] As this Court recognized in *Caltex*, this discussion was dicta. 344 U.S. at 153-154. Indeed, the gratuitous nature of the Court's discussion is even clearer when it is realized that neither holding nor dicta drew a distinction as to who had destroyed the bridges.

measures necessary for their safety and efficiency . . . ." 120 U.S. at 239.[24]

In so doing, this Court turned to the writings of Vattel for guidance as to what losses of an individual in time of war are compensable from the general treasury and what losses must be borne by the person upon whom they fall. This reference was particularly apt for the writings of Vattel, along with those of Grotius, Bynkershoek, Pufendorf, and Locke express the basic historical considerations underlying the Just Compensation Clause.[25] Vattel draws a distinction between two kinds of losses occasioned by a government's military actions:

> (1) *Noncompensable:* those that are "merely accidents—they are misfortunes which chance deals out to the proprietors on whom they happen to fall." Vattel terms these losses as being caused by "inevitable necessity" and gives as an example "the destruction caused by the artillery in retaking a town from the enemy."
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> (2) *Compensable:* those that are done "deliberately and by way of precaution." Vattel gives

[24] Petitioners respectfully submit that the omitted portion of the sentence quoted in the text indicates that the *Pacific Railroad* Court did *not* intend that losses such as are involved here were to be exempted from the protection of governmental liability. For the Court went on: ". . . we do not mean to include claims where property of loyal citizens is taken for the service of our armies, such as . . . buildings to be used . . . to house soldiers or take care of the sick, or claims for supplies seized and appropriated." 120 U. S. at 239.

[25] See Grant, "The 'Higher Law' Background of the Law of Eminent Domain," 6 Wisc. L. Rev. 67 (1931); Corwin, "The 'Higher Law' Background of American Constitutional Law," 42 Harv. L. Rev. 149 and 365 (1928); Antieau, *Rights of Our Fathers* (1968), particularly chapter one.

> two categories of examples here: "when a field, a house, or a garden, belonging to a private person, is taken for the purpose of erecting on the spot a town rampart, or any other piece of fortification;" and "when his standing corn or his storehouses are destroyed, to prevent their being of use to the enemy."[26]

Except for *Caltex* the decisions of this Court are in agreement with this analysis. In *United States* v. *Russell,* 13 Wall. (80 U.S.) 623 (1871), it was held that the owner of steamboats seized by the Government during the Civil War—and used to transport Union forces—was entitled to compensation. The Court noted that although normally compensation is a "condition precedent . . . to the right of the government to deprive the owner of his property without his consent," in "certain extreme cases" property may be taken and compensation paid later (13 Wall. at 627-28):

> Unquestionably such extreme cases may arise, as where the property taken is imperatively necessary in time of war to construct defences for the preservation of a military post at the moment of an impending attack by the enemy, or for food or medicine for a sick and famishing army utterly destitute and without other means of such supplies, or to transport troops, munitions of war, or clothing to reinforce or supply an army in a distant field, where the necessity for such reinforcement or supplies is extreme and imperative, to enable those in command of the post to maintain their position or to repel an impending attack, provided it appears that other means of transportation could not be obtained, and that the transports impressed for the purpose were imperatively required for such immediate use.

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[26] *Le Droit des Gens,* lib. iii, c. 15, s. 232 (1758).

"[I]t is the emergency," the Court went on, "that gives the right [to take], and it is clear that the emergency must be shown to exist before the taking can be justified." *Id.* at 628. When this justification is shown, the officer taking the property is not a trespasser and "the government is bound to make full compensation to the owner." *Id.* In *Russell* the order impressing the steamboats into Army service recited the "imperative military necessity." As the facts showed that the emergency justified the order, the Court ruled that the Government "is bound to make full compensation to the owner for the services rendered." 13 Wall. at 629. The Court went on to summarize the rule in terms of the competing values discussed above (*id.*):

> Such a taking of private property by the government, when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate, and the danger, as heretofore described, is impending, and it is equally clear that the taking of such property under such circumstances creates an obligation on the part of the government to reimburse the owner to the full value of the service. Private rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the government must make full restitution for the sacrifice.[27]

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[27] The Court determined that a contract, based upon a theory of *indebitatus assumpsit*, arose between the United States and Russell. In so doing the Court avoided the prohibition of the Act of July 4, 1864, 13 Stat. 381, which took away the Court of Claims' jurisdiction to hear any "claim against the United States, growing out of the destruction or appropriation of, or damage to property by the army or navy" during the Civil War. That the Court of

Russell relied in part on this Court's earlier decision in *Mitchell* v. *Harmony*, 13 How. (54 U.S.) 115 (1852). There an army officer was sued individually for having ordered the owner of wagons and mules to accompany U.S. troops into battle, the result of which was loss and damage to the property involved. The officer, represented by the Attorney General, argued that the order was justified by the fact that the troops were far from supplies, on a dangerous expedition, and that within the honest judgment of the officer the order was necessary. This Court disagreed, holding that the lower court correctly instructed the jury that there must be "an immediate and impending" danger from the public enemy or "a necessity urgent for the public service such as will not admit of delay," to justify the taking of private property by a military commander. In so holding, the Court, speaking through Mr. Justice Taney, emphasized: "It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified." Where there is such an emergency, the officer is not a trespasser, but "[u]nquestionably, in such cases, the government is bound to make full compensation to the owner . . . ." 13 How. at 133-34.

As noted earlier in *United States* v. *Pacific R. R.*, 120 U.S. 227 (1887), the bridges were destroyed by both the Confederate and the Union forces during the

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Claims could grant compensation for a taking of private property on a theory of implied contract where there is no dispute concerning title has been long settled. See *United States* v. *Great Falls Mfg. Co.*, 112 U.S. 645, 657 (1884); *United States* v. *North Am. Transp. & Trading Co.*, 253 U.S. 330, 335 (1920); Abend, "Federal Liability for Takings and Torts," 31 Fordham L. Rev. 481-94 (1963).

heat of battle.[28] Thus as Mr. Justice Harlan concluded, "Except in the extraordinary situation" of *Caltex,* "no case in this Court has held that the Government is excused from providing compensation when property has been 'taken' from its owners during wartime in the interest of the common good." *United States* v. *Central Eureka Mining Co.,* 357 U.S. 155, 182 (1958) (dissenting opinion).

If it requires an "extraordinary situation" to deny compensation in time of war, surely there can be no situation in time of peace which would justify denial of compensation to an owner whose property has been seized and used by U. S. military forces.

2. *The English Common Law.*

In *Caltex,* this Court reiterated its long-standing recognition that the common law is a source of construction of the Fifth Amendment. 344 U.S. at 154. Although there are certain references in the Year-

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[28] It is not clear from the facts as reported, under what circumstances the bridges were destroyed, but, as the House of Lords concluded in analyzing the case, no other assumption can reconcile the conclusion with Vattel and the other authorities cited by the Court. *Burmah Oil Co., Ltd.* v. *Lord Advocate,* [1964] 2 All E.R. 348, 362, 392, 399.

Juragua Iron Co. v. *United States,* 212 U.S. 297 (1909); *Herrera* v. *United States,* 222 U.S. 558 (1912), and *Diaz* v. *United States,* 222 U.S. 574 (1912), are not contrary to the principles developed in *Harmony, Russell* and *Pacific Railroad,* for the compensation was denied in the former three cases on the ground that the property destroyed was that of the enemy for which the United States could not have been held liable to the individual owner. See 212 U.S. at 306, 308-309, 222 U.S. at 569.

books,[29] the earlier cases most often regarded as the genesis of the Just Compensation principle in the common law are *The Case of the King's Prerogative in Saltpetre,* 12 Coke's Rep. 12, 77 Eng. Rep. 1294 (1606), and *Mouse's Case,* 12 Coke's Rep. 63, 77 Eng. Rep. 1341 (1608).

Saltpetre was decided shortly after gunpowder became important to the defense of England. It involved the rights and duties of the Crown in connection with the acquisition of the basic mineral compounds of gunpowder. The judges in Parliament found that saltpetre "concerns the necessary defense of the realm" and hence, held that the King had the right of purveyance. By this, they meant that the Crown could preemptively purchase saltpetre but, at the same time, they held that payment was required. See 1 Blackstone *Commentaries on the Laws of England* chap. 8, par. VI, p. 215 (U.S. ed. 1836); *Attorney General* v. *De Keyser's Royal Hotel,* [1920] A.C. 508, 571, [1920] All E.R. 80, 107. The Crown was also regarded as having the right to go upon a private person's land to take saltpetre. However, in so doing, the ministers of the Crown were to "leave the inheritance of the subject in so good a plight as they found it, which they cannot do if they might cut the timber growing, which would tend to the disinheritance of the subject, which the King by prerogative cannot do . . . ." *Saltpetre,* 12 Coke's Rep. at 12-13 (1606).

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[29] Y.B. 12, Henry 8, f. 16, c. 1 (1521); Y.B. 21, Henry 7, p. 27, c. 5 (1506), in Brooke's Graunde Abridgement, p. 293, c. 213; Y.B. 8, Edw. 4 (1468), in Brooke's Graunde Abridgement, p. 207, c. 45, all referred to in *Burmah Oil Co., Ltd.* v. *Lord Advocate,* [1964] 2 All E.R. 348, 385.

In reaching this conclusion the Court referred to the right of "every man" to "come upon my land for the defence of the realm," and that "on such extremity they may dig for gravel, for the making of bulwarks: for this is for the public, and every one hath benefit by it . . . ." *Id.* Although "a thing for the commonwealth every man may do without being liable to action," this does not mean that the person whose private property is used for the bulwarks shall suffer the loss alone, "but after the danger is over, the trenches and bulwarks ought to be removed, so that the owner shall not have prejudice in his inheritance." *Id.*

Mouse's Case provides a similar rule: When a ship is in danger and it becomes necessary to throw one person's goods overboard in order to save the possessions and lives of all, the action is justifiable and the owner may not recover the value of his goods from the one who threw them overboard. But again, "*every* man ought to bear his loss"—meaning that all who benefit from the sacrifice are to share in the loss of he whose goods were sacrificed. 12 Coke's Rep. 63 (emphasis added). See *Burmah Oil Co., Ltd.* v. *Lord Advocate,* [1964] 2 All Eng. Rep. 348, 383 (H.L.); *Hallett* v. *Wigram,* 9 C.B. 580, 137 Eng. Rep. 1018, 1027 (1850).

These basic principles have been repeatedly applied by English courts to situations of military necessity. Necessity gives the right on the part of the military to take and use private property, see Chitty, *Prerogatives of the Crown,* ch. 4, sec. 5, p. 44, but "there is no such necessity to take without compensation, if in fact the Crown or the state has the means to pay." *Burmah Oil, supra,* at 384; *Attorney General* v. *De Keyser's*

Royal Hotel, [1920] A.C. 508, 529, 542, 562, 569, [1920] All E.R. 80, 87, 94, 104, 105.

A search made in connection with the case of *De Keyser's Royal Hotel* led the House of Lords to conclude that at least since 1660 there *was not a single instance in which there was a taking or interference with land or personalty for military necessity without payment having been made.* See *Burmah Oil,* [1964] 2 All E.R. at 354. Lord Reid of the House of Lords concluded in *Burmah Oil*: "Negative evidence may not amount to proof, but it is so strong that I would hold it established that the prerogative was never used or attempt to be used in that way in modern times . . . ." *Id.* Lord Pearce in the same case concluded that the search of the Crown records in *De Keyser* "have shown . . . a practice of compensation maintained from early times." *Id.* at 387.

3. *The International Cases.*

As a practical matter, principles of international law ultimately turn upon the same considerations of natural justice and equity which underly the Just Compensation Clause. The pertinent international principle has been summarized as follows:

> Where property is damaged in the path of war, under the necessities of war, damages will not be allowed. Where, however, real property is used, occupied, etc. so as to *expose* that property particularly to enemy fire, compensation is made for such use on the ground that the property has been seized for public use and destroyed as so employed.

2 Whiteman, *Damages in International Law* 1421 (1937) (emphasis added).

These principles were applied in various international arbitrations. For example, compare *Shattuck's Case* (1868) and *Riggs Case* (1868), in IV Moore, *International Arbitration* 3668 (1898) with *Putegnat's Heirs* (1871), in *Id.* at 3718-3720. In *Shattuck* compensation was denied upon a finding that the damage to the claimant's farm and crops was caused by the armies of both sides passing through and fighting over the land. This was determined to be "the result of the inevitable accidents of a state of war" and hence noncompensable. In *Riggs* compensation was likewise denied upon a finding that the battle took place upon the claimant's property. In *Putegnat's Heirs*, on the other hand, the claim involved goods within a house that had been seized and converted into a fortification by the Mexican Army. The goods were then destroyed by fire set by shells of the enemy. American Commissioner Wadsworth awarded compensation, concluding that there had been "a seizure of the house and goods . . . for the public service, and their destruction by the enemy [was] a necessary consequence of the nature of the service to which, for the public benefit, the goods were subjected." Citing Vattel, *Mitchell* v. *Harmony* and other cases, Commissioner Wadsworth held that the Government must pay compensation for the property so taken and used as a source of refuge and defense (emphasis added):

> There cannot be much doubt about the general principles. Is there any doubt about their application in this case? The enemy destroyed the property indeed, but only after the government had taken it for public use, by being used by the government, and because it was so used. It will be found to be an immaterial fact that the enemy destroys the property after the government has

> found it necessary to seize it and use it against the enemy. The horses, wagons, etc., impressed by the government forces for use against the enemy or in the public service in general, although only a temporary use was intended, must be paid for, although destroyed or captured by the enemy. *'It is the seizure of private property for the public use and its loss or destruction while so employed, whether by the enemy or the government, that entitles the owner to payment.*

Similarly, in *American Elec. & Mfg. Co.* (United States v. Venezuela), Ralston's Report, p. 128 (1904), compensation was awarded to a corporation for damage to its telephone plant which occurred after the Venezuelan troops had taken possession of the plant during an attack by revolutionaries. The rationale was that the losses were due to the "previous and deliberate occupation by the Government for public benefit or as being essential for the success of military operations." And in *Annuziata Petrocelli* (Italy v. Venezuela), Ralston's Report 762 (1904), compensation was awarded to an Italian claimant for damages inflicted by the rebels after Government troops had entrenched themselves in *front* of the claimant's house. The Commissioner stated (*id.* at 763):

> When the Government troops entrenched themselves in front of claimant's habitation and took possession they made it the object of the enemy's attack. They condemned it specially to public use. Claims for damages to it were taken out of the field of the incidental results of war, the Government having invited its destruction. The claimant's property was exposed to a special nature, in which the property of the rest of the community did not share. The Government's responsibility for its safe return was complete. The principle

upon which such responsibility rests is above indicated, and is more at large set forth in 4 Moore, page 3718, Putegnat's Heirs, decided by the American-Mexican Commission formed under the treaty of 1868, which decision was recently followed in the case of American Electric and Manufacturing Company v. Venezuela.[30]

4. *Application of Historical Antecedents.*

The court below extended the *Caltex* rationale to the facts in the instant case. Determining the soundness of this extension necessarily involves the question of whether the historical underpinnings of *Caltex* can be construed to support that extension. As we have demonstrated above, neither the basic American case law, the English common law, nor applicable principles of international law justify the result below.

In the instant case, there is no doubt concerning the necessity of the situation. Necessity permitted the Government to seize, occupy, and use these buildings for the purpose of defending the entire Zone. But, as demonstrated by the principles developed above, neces-

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[30] See also Borchard, *Diplomatic Protection of Citizens Abroad*, 262-64 (1915); *Walker* v. *United States*, 34 Ct. Cls. 345, 347 (1899).

It is also of note that at least since 1863 it has been official United States instruction to its troops in the field to give receipts for and make payments for land and personalty taken from foreign citizens. See the Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, issued by the President, April 24, 1863 (known as the Lieber Code), VII Moore, Digest of International Law 173 (1906); War Department Rules of Land Warfare of 1940, No. 339; Dept. of the Army, Law of Land Warfare, 1956 (F. M. 27-10) Nos. 407-09, 412.

sity does not require that one person shall bear the entire loss for the good of the whole. The damage that occurred here was not battle damage so as to make the person whose property was lost bear it alone. These buildings were not damaged and destroyed by random artillery or bombs or bullets used to dislodge the enemy or any of the events described as "mere accidents by Vattel. Rather, this case involves a deliberate taking by the Army of these buildings for a place of command. refuge, and fortification. This taking was for the good of the whole community. However, the community, in the form of the Government, has refused to share that loss.

Denial of compensation by an improper extension of *Caltex* ultimately impairs the balance between the Government's right to seize and the citizen's right to protection of his property. For the necessary effect of the lower court's ruling is that the Government is now virtually immune from liability under the Fifth Amendment for the actions of U.S. forces in any past, present or future riot involving intense confrontations between federal troops and aroused citizens. So long as an "immediate danger" is claimed to be present, the troops can, under the present holding, seize and use property on a "temporary" basis without incurring liability for any loss which might occur during that use. Such a "danger" will be inevitably present or potentially present whenever the situation reaches the point at which federal troops must be called in.

By any standard this is an extraordinary result. We believe it is visably at odds with the basic philosophy of the Fifth Amendment, and that it ought to be reversed.

III.

THE DECISION IN U. S. v. CALTEX OUGHT TO BE RE-EXAMINED AND OVERRULED

If this Court should find that *Caltex's* rationale can somehow be extended to support the result below, then we respectfully urge that this Court's decision in *U.S. v. Caltex* be re-examined and overruled. For its underlying assumption that the Government must be able to seize and destroy property in time of war without regard to the niceties of compensation at a later date is essentially foreign to the basic concept of the Fifth Amendment and its guarantee of the use and enjoyment of private property. The proper philosophy was expressed by Justice Douglas dissenting in *Caltex* with Justice Black [344 U.S. at 156]:

> I have no doubt that the military had authority to select this particular property for destruction. But whatever the weight of authority may be, I believe that the Fifth Amendment requires compensation for the taking. The property was destroyed, not because it was in the nature of a public nuisance, but because its destruction was deemed necessary to help win the war. It was as clearly appropriated to that end as animals, food, and supplies requisitioned for the defense effort. As the Court says, the destruction of this property deprives the enemy of a valuable logistic weapon.
>
> It seems to me that the guiding principle should be this: Whenever the government determines that one person's property—whatever it may be—is essential to the war effort and appropriates it for the common good, the public purse, rather than the individual, should bear the loss.

We believe that the "guiding principle" enunciated by Justice Douglas is and should be the guiding principle today. Its essential forthrightness and soundness

are as valid today as they were in 1952 or at the time of the adoption of the Fifth Amendment.

The decision below rejects that principle in favor of a somewhat limited view of the Government's responsibility. It correctly asserts that the Government has a duty to protect the public in general and that this duty includes the seizure and use of private property when necessary. But this is not and never has been the true issue. Rather the question is who pays for losses arising out of or occurring during that seizure and public use.

We have shown in Part II of the Argument that basic principles authorized the public, acting through its Government, to take and use private property when it is for the good of all. Natural justice and equity demand as well that the community which benefits from the sacrifice of the property of one person should contribute to its restoration. This is certainly true of a taking and *use*—as even *Caltex* recognized. The fact that the "use" in *Caltex* was a destruction should be of no constitutional significance. For the duty to provide compensation in such a case has been recognized as far back as *Mouse's case,* 12 Coke's Rep. 63, 77 Eng. Rep. 1341 (1608), where the court, while holding that one man's goods might be thrown overboard to save a foundering ship and the owner shall have no remedy against the person who threw the goods over, ruled as well that the loss of the one hapless individual should be borne by all who were saved by his sacrifice. See *Burmah Oil Co., Ltd.* v. *Lord Advocate,* [1964] All E.R. 348, 383 (H.L.); *Hallett* v. *Wigram,* 9 C.B. 580, 137 Eng. Rep. 1018, 1027 (1850). This principle was recently reaffirmed by the House of Lords in *Burmah*

Oil, where Lord Reid remarked that "it was *rightly* not argued that the fact that property is taken for destruction and not for use can make any difference," and again, "there is no difference in principle between taking for use and taking for destruction." *Id.* at 355, 361 (emphasis added).

In *Caltex,* a majority of this Court rejected such reasoning referring to a series of common-law precedents upon which it relied in justifying the general language of *Pacific Railroad.* The Court stated (344 U.S. at 154) that the principles expressed in *Pacific Railroad:*

> were neither novel nor startling, for the common law had long recognized that in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved.

In support of this proposition, the Court cited *Bowditch* v. *Boston,* 101 U.S. 16, 18-19 (1879); *Respublica* v. *Sparhawk,* 1 Dall. 357 (Pa. Sup. Ct. 1788); *Parham* v. *The Justices,* 9 Ga. 341, 348-49 (1851), and 2 Kent's *Commentaries* 338 (14th ed. by Gould, 1896). But a close reading of these authorities indicates that they are either inapplicable or based upon a clear misreading of earlier precedent.

Bowditch was a suit against the City of Boston for damages suffered when Boston firemen destroyed the plaintiff's buildings to prevent the spreading of a fire. The circuit court denied recovery under a Massachu-

setts statute, and this Court affirmed. It should first be noted that the suit was brought under a Massachusetts statute and the entire claim rested on that statute. No claim was made under the Fifth Amendment Just Compensation Clause, and none could, for it had been held that that Clause applied only to the Federal Government. *Barron* v. *Baltimore,* 7 Pet. (33 U.S.) 243 (1883). And the process of applying the restrictions of the Bill of Rights to the states through the due process clause of the Fourteenth Amendment had not yet begun when *Bowditch* was decided. The Court did go into the common law, however, saying that there was no remedy for the owner. The Court relied upon the *Saltpetre* case, *Mouse's Case,* and *British Cast Plate Manufacturers Co.* v. *Meredith,* 4 Term Rep. 794, 100 Eng. Rep. 1306 (1792), as well as *Respublica* v. *Sparhawk.* As we have demonstrated, *Saltpetre* and *Mouse* stand for the exact opposite of the proposition for which they were cited. In *Saltpetre,* it was held that although military necessity gave the Crown a preemptive right to purchase saltpetre, and a right to come upon private property to dig it, the Crown must pay for the saltpetre and not disturb the land, or replace what it has disturbed. In *Mouse* the holding was that one could throw overboard the goods of another to save a foundering ship, but the loss was to be shared by all.

British Cast Plate Manufacturers Co. v. *Meredith* was also inapplicable to the facts in *Bowditch.* First, it was a suit against certain commissioners who had been empowered by Parliament to pave a certain road. Plaintiff sued the commissioners individually, claiming that the paving raised the level of the

road, preventing wagons and carriages from passing under the archway into his property. He sought the cost of raising the archway. The court denied recovery on the ground that since the commissioners had not exceeded their jurisdiction they could not be held individually liable. Secondly, the court relied upon the fact that, in the Act authorizing the paving, Parliament had provided an administrative remedy for just such damages as this, and plaintiff was limited to that remedy. Finally, the remaining dictum in the opinion which might have supported *Bowditch,* was disapproved by the House of Lords in *Burmah Oil,* [1964] 2 All E.R. at 355.

Respublica v. *Sparhawk,* 1 Dall. 357 (Pa. Sup. Ct. 1788), was a decision of the Pennsylvania Supreme Court concerning some flour that had been moved by the State pursuant to a resolution of the Continental Congress—from Philadelphia to Chestnut Hill, in an attempt to keep it from the British who were about to occupy Philadelphia. The British, however, occupied both Philadelphia and Chestnut Hill and seized the flour. Sparhawk presented a claim to the Comptroller-General of the State of Pennsylvania for the value of the flour seized. Upon the denial of his claim, Sparhawk appealed to the State Supreme Court. That court held that, as the Comptroller-General had no jurisdiction over the claim, an appeal could not lie and the court had no jurisdiction. However, the court did go on to say that there was no merit to the claim since the flour was moved by the Pennsylvania Board of War at the behest of the Continental Congress. The claimant argued that, as the Board of War was an agent of the State, the State was responsible for the acts of the

agent on a theory of *respondeat superior*. The Court rejected the claim on the ground that the agent would not have been liable for a taking of necessity, and therefore, the principal could not be liable on a *respondeat superior* theory. The case, if properly analyzed in terms of the action before the Court, supplies no support for either *Caltex* or *Bowditch*.

Parham v. *The Justices*, 9 Ga. 341 (1851), was an action to enjoin the taking of private property for a road without compensation. The injunction was granted upon the general principles and authorities explored in Part II of this Argument. The Court went on to say, however, that in case of necessity one may take private property for a public use and the individual taking the property was not personally liable, referring once again to the examples of pulling down houses and raising bulwarks for the defense of the state against an enemy. Once again reference was made to *British Cast Plate Manufacturers Co.* v. *Meredith, Saltpetre, Mouse,* and *Gedge* v. *Minne,* 2 Bulst. 60, 80 Eng. Rep. 958 (K.B. 1688), which had also been referred to in *Sparhawk*. That an individual acting for the good of the public cannot be held personally liable in tort, is the force of the *Parham* dicta. The dicta is unassailable, but is immaterial to whether the public, through its government, should share the loss on property taken *pro bono publico*.

Gedge v. *Minne,* 2 Bulst. 60, 80 Eng. Rep. 958 (K.B. 1688), is equally distinguishable. It held that a person may go upon the land of another to chase and kill a badger, which the court described as "vermine," a "noysome beast" without incurring liability for the

trespass, for the killing of a beast "offensive and hurtful to the common wealth" is a full justification.[31]

Pacific Railroad, also relied (120 U.S. at 234) upon *Taylor* v. *Nashville & C. R.R.,* 6 Coldwell (46 Tenn.) 646 (1869), and *Mayor of New York* v. *Lord,* 17 Wend. 285 (N.Y. Sup. Ct. Jud. 1837), affirmed, 18 Wend. 126 (N.Y. Ct. Tr. Imp. & Errors 1837). *Taylor* v. *Nashville & C.R.R.* concerns whether title passes when property is taken by the state under the doctrine of military necessity and then is sold by the state to another when it is found no longer to be necessary. The court held that upon the taking, title vested in the state and could be passed upon a sale. Nothing was held or said concerning the right of the original owner to compensation from the state for the taking.

Mayor v. *Lord* arose out of a destruction of a building to stop the spread of fire. A New York statute provided for compensation to the building owner for this destruction. The court was faced with whether the statute should be so construed as to permit compensation for the owner's personalty within the building as well. Chief Justice Nelson referred to the common law to aid the construction of the statute. Referring to the common-law principle of necessity that

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[31] Chancellor Kent (in the 14th edition cited by this Court in *Caltex*) also referred to the common-law cases in concuding that "no action lay at common law by the individual who sustained the injury; but private property must, in many other instances, yield to the general interest." But again, from the cases cited by Kent and particularly by a comparison with the First Edition of his *Commentaries,* Vol. 2, pp. 274-76 (1827), it is clear that he was referring only to a suit by the injured party against the person who pulled down the house, etc.

held harmless an individual who might act to pull down a house or throw overboard goods in order to save a town or ship, Chief Justice Nelson drew the distinction apparently lost sight of in many of the cases between holding the individual liable and having the person's sacrifice shared by the community:

> Whatever difference of opinion . . . may exist as to the true construction of the statute, there cannot, I think, be any as to the equity and justice of the claim against the City. It rests upon the great fundamental principle, and which is now incorporated into our Constitution, that private property shall not be taken for public use, without just compensation. It was said, on the argument by the counsel for the City, that the statute did not stand upon this principle, inasmuch as no damages were recoverable at common law. . . . But the obvious answer is, that in all cases of the kind, the individual concerned in the taking or destroying of the property is not personally liable. If the public necessity in fact exists, the act is lawful. Thus, houses may be pulled down, or bulwarks raised for the preservation and defense of the country, without subjecting the persons concerned to an action, the same as pulling down houses in time of fire; and yet these are common cases where the sufferers would be entitled to compensation from the national government within the constitutional principle. Const. U.S., Art. 5 of the Amendments.
>
> In all the cases in the books denying the remedy at common law, it is admitted the party may justly claim satisfaction from the public. Thus, in the saltpetre case, the justices say, that "After the danger is over, the trenches and bulwarks ought to be removed, so that the owner shall not have prejudice in his inheritance:" and in *Governor, etc., of Cast Plate Manufs.* v. *Meredith,* 4 T.R., 797, Buller,

> J., remarks: "The civil law writers indeed say, that the individuals who suffer have a right to resort to the public for satisfaction; but no one ever thought that the common law gave an action against the individual who pulled down the house, etc.; this is one of those cases to which the maxim applies, *salus populi, est suprema lex.*"

17 Wend. at 291-292.

One might go on to dispose of case after case in the same manner,[32] but the point is clear. There is a doctrine of necessity at the common law, which holds that a person who trespasses on land because of necessity shall not be held liable. A person may pull down a house to stop the spread of fire, or may go onto land to raise bulwarks and ramparts against a common enemy, or may do many other things *pro bono publico,* and the necessity of the situation is a complete defense to an action in tort against him personally. But this doctrine should not and cannot be transposed into a holding that a community shall stand by and benefit when one person's property is taken and used or destroyed for the good of all.

Necessity may give the justification for the taking, use, and destruction, but there is no necessity that one hapless individual shall bear the entire loss. This was the holding of *Burmah Oil Co., Ltd.* v. *Lord Advocate* [1965] A.C. 75, [1964] 2 All E.R. 348 (H.L.),

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[32] See the analysis of the old cases in *Field* v. *City of Des Moines,* 39 Iowa 575 (1864), and Hall and Wigmore, "Compensation for Property Destroyed To Stop the Spread of a Conflagration," 1 Ill. L. Rev. 501 (1907), particularly 514-20.

which held (with two dissents) an oil company entitled to compensation for oil installations and equipment destroyed by the British Army in Burma to prevent their capture by the advancing Japanese—a case on all fours with *Caltex*. In so holding, the House of Lords analyzed the same common-law cases and text writers that this Court relied upon in *Pacific Railroad* and *Caltex*, and concluded that there was no precedent justifying a denial of compensation where private property is destroyed for a public purpose. As for *Caltex* itself, the House of Lords concluded that, insofar as the Fifth Amendment embodied the common-law principles of just compensation, the result was wholly unsupported by its authorities.[33]

We agree with the *Caltex* court to the extent it looks to these common-law principles in construing the Just Compensation Clause. But as the House of Lords concluded in *Burmah Oil*, these principles furnish no support for the *Caltex* holding. Hence it ought to be unequivocally overruled on the ground that it is fundamentally at odds with the Fifth Amendment and our modern understanding of the Government's responsibilities to its citizens.

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[33] Lord Reid, writing the principal opinion, advised that, if this Court's decisions in *Pacific Railroad* and *Caltex* constituted a construction of the common-law antecedants to the Fifth Amendment, "I am afraid I must disagree . . . ." [1965] A.C. at 11, [1964] 2 All E.R. at 361.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed and the case remanded for a determination of the amount of compensation due petitioners.

Respectfully submitted,

HARDING A. ORREN
ROBINS, DAVIS & LYONS
Dain Tower
Minneapolis, Minnesota

RONALD A. JACKS
1025 Connecticut Ave., N.W.
Washington, D. C.

SHERMAN L. COHN
506 E Street, N. W.
Washington, D. C.

Counsel for Petitioners

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